No. 88-234 (4)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN S. LYTLE

Petitioner,

v.

HOUSEHOLD MANUFACTURING, INC.,
D/B/A SCHWITZER TURBOCHARGERS,

Respondent.

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Did the Fourth Circuit err in holding violations of the Seventh Amendment unreviewable on direct appeal when the district court compounds the violation by deciding itself the questions that should have been presented to the jury?

LIST OF PARTIES

The respondent, Household Manufacturing, Inc., is a wholly owned subsidiary of Household International, Inc. All other parties in this matter are set forth in the caption.

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OPINIONS BELOW

The opinion of the court of appeals is unpublished, and is set out in the Appendix to the petition for writ of certiorari ("App.") at pages 1a-21a. The order of the court of appeals denying rehearing, which is not reported, is set out at App. 22a-24a. The district judge's bench opinion, which is unreported, is set out at App. 25a-31a and in the Joint Appendix (JA) at pages 56-64. The order of the district court dismissing the case is set out at App. 34a-35a.

JURISDICTION

The judgment of the court of appeals affirming the district court's dismissal of the case was entered on October 20, 1987. App. 1a. A timely petition for

rehearing was denied on April 27, 1988. On July 19, 1988, Chief Justice Rehnquist entered an order extending the time for filing a petition for writ of certiorari to and including August 25, 1988. The petition for writ of certiorari was filed on August 23, 1988, and was granted on July 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES, CONSTITUTIONAL PROVISION, AND RULES INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Section 1981 of 42 U.S.C. provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-(2)(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer-
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin . . . .

Rule 38 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.
>
> (b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

Rule 39 of the Federal Rules of Civil Procedure provides in pertinent part:

> (a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or

> all of those issues does not exist under the Constitution or statutes of the United States.

STATEMENT OF THE CASE

This action involves claims of intentional racial discrimination in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-5. Petitioner John S. Lytle, a black person, contends that he was fired by respondent on account of his race and that respondent then retaliated against him for pursuing his federal equal employment opportunity claims.

1. Background

Schwitzer Turbochargers, a subsidiary of respondent Household Manufacturing, Inc. [hereafter referred to as "Schwitzer"], makes turbochargers and fan drives at its Arden, North Carolina, plant. Tr. 13. In February 1982,

Schwitzer adopted an employee absence policy with the following salient features. First, workers must report all anticipated absences to their supervisors "as soon as possible in advance of the time lost, but not later than the end of the shift on the previous workday." PX 22, p. 1. Second, certain kinds of absences -- in particular, those involving personal illness, PX 22, p. 2 -- are characterized as "excused." Third, even though absence due to illness is excused, an "excessive" level of such absences -- defined as a "total absence level which exceed[s] 4% of the total available working hours, excluding overtime," id. at 2-3 -- "will, most likely, result in termination of employment." Id. at 3. Fourth, a worker also faces termination for excessive absence if he has "any unexcused absence which exceeds a total of 8 hours (or one scheduled work shift) within the preceding 12-month period." Id.

Petitioner is an experienced machine operator.[1] Tr. 84. In January 1981, he was hired by respondent as a machinist trainee at the Arden plant. Less experienced whites were hired directly into machine operator positions. Tr. 83-84, 87. Ultimately, petitioner achieved the highest graded machinist classification. Tr. 87-89. In his 1982 performance evaluation, he was commended for his good attendance record. Tr. 86; PX 6. Until the events that precipitated this lawsuit, he had never been reprimanded or disciplined for attendance problems. Tr. 86-87.

[1] This discussion of the events pertaining to petitioner's discharge claim is based primarily on Lytle's testimony at trial. The district court dismissed his discharge claim at the close of petitioner's evidence; hence, virtually all the record testimony on behalf of the respondent goes only to retaliation, not discharge.

2. Petitioner's Termination

In February 1983, petitioner embarked on a rigorous evening program studying mechanical engineering at Asheville-Biltmore Technical College. Tr. 90-95.[2] By the summer, he began to suffer health problems. The plant nurse recommended that he consult a doctor. Tr. 71-72, 121. In June or July, Lytle also informed his supervisor, Larry Miller, who was white, of his health problems and stated that for this reason he preferred not to work overtime. Tr. 120.

At the beginning of August 1983, Lytle cut back his school program to two evenings per week. Tr. 95. During the first week of August, Schwitzer machinists

[2] On class days, Lytle left work at 3:30 p.m., arrived home about 4:00 p.m., had something to eat, arrived at the college library to study at 4:30 or 5:00 p.m., and attended class from 6:30 p.m. until between 9:00 and 11:00 p.m. Tr. 92. He also frequently found it necessary to study in the late evening and early morning hours. Tr. 120.

were called upon to work a substantial amount of overtime in order to keep up with production requirements. Tr. 238.

The next week, Lytle's health problems worsened,[3] and he scheduled an appointment for Friday, August 12, 1983, with a doctor who had been recommended by the Schwitzer nurse. Tr. 122, 130-131. On Thursday morning, August 11, Lytle asked his supervisor for permission to schedule Friday, August 12, as a vacation day. Tr. 129-132.[4]

At the time, Miller approved petitioner's request. Tr. 130. However, later in the day, Miller told petitioner that "if you're off Friday, you have to work on Saturday,"

[3] On one occasion he became so dizzy that he fainted. Tr. 132.

[4] Although sick leave would have been granted for a doctor's appointment, Lytle preferred to have the absence treated as a vacation day. Tr. 194. Such treatment meant that the day would not be counted as an absence under Schwitzer's policy regarding "excessive absence." Tr. 208.

Tr. 131, which was not a normal work day for Lytle, Tr. 132. Lytle "explained that I wanted Friday off to see the doctor, and I wouldn't be able to work Saturday because I was physically unfit." Tr. 131-32. When Miller still insisted that Lytle work on Saturday, Lytle told him that he would also take Saturday as a vacation day. Tr. 132. Miller walked off, without objecting to this suggestion. Tr. 132. Lytle understood that Friday would be treated as a vacation day, and that he had sufficiently informed Miller that he was physically unable to work on Saturday. Tr. 191. Moreover, Lytle repeated his intentions to the

Human Resources Counselor, Judith Boone. Tr. 137-138.[5]

Lytle returned to work on Monday, August 15. After a meeting with Schwitzer's personnel manager and Miller, during which Lytle was asked to provide an explanation for his absence, Lytle was fired. Tr. 142-143. The apparent reason for the termination was for alleged excessive unexcused absences, primarily the Friday and Saturday shifts Lytle had missed as a result of his health problems.[6] JA 8; Tr. 220. Had petitioner's

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[5] Boone confirmed that Lytle had a conversation with her that day regarding problems with Miller; however, she testified that she did not recall any mention of vacation scheduling. Tr. 60-61.

[6] In addition to the two days in question, apparently Schwitzer treated Lytle's departure on Thursday, August 11, shortly after the normal end of his shift, as 1.8 hours of "unexcused absence," because he did not work two hours of overtime that may or may not have been scheduled. There was conflicting evidence concerning whether Lytle was in fact scheduled for overtime on Thursday and whether his purported failure to inform Miller that he had to leave was directly attributable to Miller's behavior toward Lytle. Tr. 135. In any event, the district judge found Lytle to have had 9.8 hours of unexcused absence. JA 59-60.

absences been properly classified either as vacation days or as excused absences, he would not have fallen within the terms of the excessive absence policy. Tr. 252-253. Moreover, Schwitzer's records showed that white employees were not terminated despite "excessive absence." Instead, these white workers were given warnings and an opportunity to improve.[7]

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[7] Donald Rancourt, a white machinist, received a written warning from Larry Miller concerning an absence rate of 7.5% in January, 1983. Tr. 217-18, 222, 230. Rancourt's April 1983 annual performance review mentioned an absence problem Tr. 48; PX 15-C, page 4. Rancourt was not terminated. Tr. 54.

As of March 2, 1984, Jeffrey C. Gregory, a white machinist, had an annual absence level of 6.3% of total available working hours. Tr. 57-58; PX 28-B. He was not terminated. Tr. 58. It is not clear whether he was even counselled concerning his excessive absenteeism. Tr. 58.

On July 13, 1983, approximately one month prior to Schwitzer's termination of Lytle, Rick Farnham, a white machine operator, was counselled for excessive absenteeism. Tr. 55-56; PX 12-B. At that time Farnham's annual absence rate was 4.3%. Tr. 56; PX 12-B. Farnham was not terminated.

On August 23, 1982, David Calloway, a white machinist, was given his second warning in three months about excessive absenteeism. In June, 1982, his absence percentage was 4.5%, and he was warned that "an immediate improvement must be made." PX 13-B, p. 1. In August, his absence percentage remained at 4.5% He had been absent for a total of 16.2 hours since the June warning, and two absences were on consecutive Mondays. Tr. 44. Instead of termination, Calloway was given an additional sixty days in which to

3. Respondent's Retaliation

On August 23, 1983, Lytle filed a charge of discrimination with the Equal Employment Opportunity Commission. Tr. 61; PX 1. This charge was received by Schwitzer's Human Resources Counselor, Judith Boone, who is white, shortly thereafter. Tr. 61-62.

At approximately the same time, Lytle began looking for another job in the Asheville area. Several prospective employers told him that they were having difficulty getting an adequate reference from Schwitzer. Tr. 111. Boone refused to return questionnaires from

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correct the problem. PX 13-B.

Finally, Greg Wilson, a white machinist, was absent two successive days without obtaining prior approval. Tr. 23-24. Of the sixteen hours of absence, eight were categorized as unexcused. The second day's absence was "excused" because Wilson called to inform his supervisor that he was ill. This two-day absence followed three unexcused tardies. Thus, as of March, 1983, Wilson had accumulated excessive unexcused absences. Tr. 67. Yet, Wilson was not fired, but merely counselled to improve his absence record. PX 14B.

two employers. Although Schwitzer claimed that it was merely applying its normal policy with respect to references for individuals who have been involuntarily terminated, Tr. 261, the company had in fact provided a favorable letter of reference for Joe Carpenter, a white male, the only other machinist involuntarily terminated prior to Lytle in 1983. See PX 10.

4. Proceedings in the District Court

Lytle filed a complaint in federal district court alleging that respondent had fired him because of his race and retaliated against him for filing a charge of discrimination with the Equal Employment Opportunity Commission, all in violation of both Title VII and Section 1981. JA 9-10. The notation "Jury Trial Demanded" appears on the first page of the complaint, JA 4, and at the end of the complaint was the following statement:

"Plaintiff requests a jury trial of all issues triable herein by a jury." JA 14. The relief requested involved backpay, damages for "emotional and mental suffering," punitive damages, and injunctive relief including reinstatement.

Respondent answered the complaint and ultimately moved for summary judgment on several grounds. On May 17, 1985, the district court denied the motion, finding that "there is a genuine issue as to material facts." Dkt. Nr. 19.

On the day of trial, the district court granted Schwitzer's motion to dismiss all claims under § 1981, holding that Title VII provides the exclusive remedy for employment discrimination. The dismissal of petitioner's § 1981 claims necessarily meant the striking of his jury

demand. JA 56-57.[8] The court then conducted a bench trial of petitioner's Title VII claims.

In essence, the trial revolved around four issues -- whether Lytle had in fact received permission from Miller not to work on Friday and Saturday, whether the decision to fire Lytle was based in whole or in part on impermissible racial motives, whether Schwitzer's absence policies had been applied to white workers who were similarly situated, and whether the refusal to provide a reference for Lytle involved retaliation for his having filed a Title VII charge. Resolution of each of these issues was critically dependent on the factfinder's assessment of the credibility of the witnesses and the plausibility of their conflicting stories.

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[8] The district court did not rule on the proposal made by Lytle's attorney that the court "dismiss the Title VII action and go to the jury on the 1981 action." Tr. 4. The district court also denied Lytle's motion for reconsideration of the § 1981 dismissal made on the second day of trial. JA 97-98.

At the close of petitioner's case, the court dismissed petitioner's Title VII discriminatory discharge claims, finding that he had failed to present a prima facie case. The district judge found that, while Lytle had demonstrated that one white employee, Greg Wilson, had exceeded the limit on unexcused absences and that at least four white employees who violated the excessive absence policy were only given warnings, the conduct of these employees was not "substantially similar in seriousness" to that of petitioner. Tr. 259; JA 59-60. This determination was based apparently on the judge's supposition that Schwitzer treated excused and unexcused absences differently, and that Wilson's infraction was de minimis. However, there was no evidence that the employer intended to treat the classes of absences differently as to the ultimate penalty that could be

imposed,[9] and the record was, by the trial judge's own recognition, unclear on the exact amount of Wilson's additional absences.[10]

Following the close of all the evidence, the judge ruled from the bench in favor of respondent on the

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[9] Indeed, the record contradicts such a conclusion in the several respects. First, Schwitzer's absence policy itself includes both excused and unexcused absences in the category for which termination will "most likely result," when the stated limits are exceeded. PX 22, p. 2. Second, the policy notes that termination of employment may result even before maximum limits are reached, where a pattern of absence, excused or unexcused, is observed. Id., p. 3. Finally, Schwitzer has already made a distinction between unexcused and excused absences by adopting a policy that permits excused absences to total at least 72 hours, assuming a year consisting of 48 weeks of 40 hours each, while tolerating only 8 hours of unexcused absences. Id.; Tr. 17 ("On the excused portion . . . , we have allowed more flexibility there."). The trial judge's addition of yet another layer of distinction, by finding that excessive excused absences are not "serious," in the face of a policy statement that "absence hurt us all" (PX 22, p. 3), suggests that the trial judge, was not acting merely as a factfinder, but was drawing a number of inferences from the evidence. Opposite inferences could have as easily been drawn. See, infra, Argument, Sec. I.B.

[10] The trial judge concluded that Wilson had exceeded the limit by only six minutes, based on his interpretation of the documents. Tr. 251-252. ("Frankly, the evidence wouldn't support this, but I think that decimal number . . . really means minutes rather than hundreths.") Cf. PX 14-B; Tr. 39, line 16-17; PX 14-C (indicating nine tardy incidents during the period of March 1983 through February 1984).

retaliation claim.[11] App. 26a-31a. The trial judge subsequently entered a judgment for defendant on all issues. App. 32a-35a.

5. Proceedings in the Court of Appeals

On appeal to the Fourth Circuit, petitioner argued, among other things, that the district court's erroneous dismissal of his § 1981 claim had denied him his Seventh Amendment right to a jury trial.

A majority of the Fourth Circuit panel acknowledged that the district court had erred in dismissing petitioner's § 1981 claim. App. 7a, n.2. But although the Court recognized that petitioner had been wrongfully denied the right to present his claims of intentional racial

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[11] The district judge found that the fact that Schwitzer had issued a favorable letter of recommendation for a white who was the only other employee whose employment had been involuntarily terminated was not sufficient; rather the judge found that instead of Lytle receiving disparate treatment, the white employee had simply been treated "disproportionately favorably." Tr. 203.

discrimination to a jury, it refused to correct this constitutional error. Instead, the appellate court followed Ritter v. Mount St. Mary's College, 814 F.2d 986 (4th Cir. 1986), cert. denied, 108 S. Ct. (1987), and held that the findings made by the district judge during the bench trial of petitioner's Title VII claims collaterally estopped petitioner from litigating his § 1981 claim. App. 8a-9a. Notably, the Court of Appeals did not conclude that a jury would necessarily have reached the same factual conclusions as the district judge. Rather, it determined only that the district judge's findings of fact were "not clearly erroneous." App. 10a-13a.

Judge Widener, in a dissenting opinion, noted that the majority's view of collateral estoppel was inconsistent with a Seventh Circuit decision on "exactly this issue" in Hussein v. Oshkosh Motor Truck Co., 816 F.2d 348 (7th Cir. 1987), and that it was "not consistent with" the

recent decision of this Court in Tull v. United States, 95 L.Ed.2d 365 (1987). App. 19a. He concluded that if the appellate courts were powerless to correct the erroneous denial of a jury trial merely because the judge involved had issued a constitutionally tainted decision of his own on the merits, "the Seventh Amendment means less today than it did yesterday." Id. A timely petition for rehearing and suggestion for rehearing en banc were denied with Judges Widener, Russell and Murnaghan voting to rehear the case en banc. Id. at 22a-24a.

SUMMARY OF ARGUMENT

I. Throughout this nation's history the right to trial before a jury of one's peers has held a revered place in American jurisprudence. Hodges v. Easton, 120 U.S. 408 (1882). The jurisprudence of this Court has recognized that juries bring to their evaluation of the facts a perspective that is distinct from that of judges. Sioux City & Pacific R.R. Co. v. Stout, 84 U.S. (17 Wall.) 657 (1874).

The Seventh Amendment preserved the right to a jury in actions at law and therefore those brought to enforce statutory rights. Curtis v. Loether, 415 U.S. 189 (1974). Thus, plaintiffs possess that right in actions brought under section 1981, provided that, as here, a proper demand has been made. Patterson v. McLean Credit Union, 105 L.Ed.2d 132 (1989). Where legal

and equitable claims are joined in the same action, this Court has held that the right to a jury trial on the legal claims is not lost, and the jury claims are to be tried first, absent compelling circumstances. Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).

II. When a district court flouts this rule, this Court has consistently reversed the judgment below and remanded for trial before a jury. This Court has never sanctioned appellate review that proceeds as if the error never happened. Granfinanciera S.A. v. Nordberg, 109 S.Ct. 2782 (1989); Tull v. United States, 481 U.S. 412 (1987); Meeker v. Ambassador Oil Corp., 375 U.S. 160 (1963).

The court of appeals fundamentally misapplied this Court's decision in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Parklane cannot be read, as did the

Fourth Circuit, to apply collateral estoppel to preclude review on direct appeal of a Seventh Amendment violation. Parklane applies by its terms, as do all principles of preclusion, to subsequent proceedings rather than to appellate review in a single proceeding. This Court has never held that a district court may accomplish by error what Beacon Theatres prohibits it from doing purposefully.

III. A rule that an appellate court may not review violations of the Seventh Amendment, so long as the district court's findings are not clearly erroneous, would fail to serve the interest in judicial repose fostered by the rules of preclusion. Instead, such a procedure would increase the burden on appellate courts by requiring parties to proceed by mandamus or take an interlocutory appeal, whenever their constitutional right to a jury has been violated. Lauro Lines S.R.L. v. Chasser, 109 S.Ct.

1976 (1989); Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).

ARGUMENT

I. THE DECISION BELOW DEPRIVED PETITIONER OF HIS RIGHTS UNDER THE SEVENTH AMENDMENT

A. The District Court Erroneously Deprived Petitioner of His Right to a Jury Trial on His § 1981 Claims

The Court of Appeals correctly recognized that petitioner's complaint stated a claim under § 1981. Johnson v. Railway Express Agency, 421 U.S. 454 (1975). In fact, the complaint raised two distinct violations of § 1981.[12] It alleged that respondent had fired petitioner on

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[12] In Patterson v. McLean Credit Union, 105 L.Ed.2d 132 (1989), this Court reaffirmed the application of § 1981 to private conduct and held that § 1981 covered the making and enforcing of employment contracts, although it did not cover racial harassment occurring after the formation of the contract.

account of race, and it alleged that respondent had retaliated against petitioner because petitioner had pursued his rights under Title VII.

Petitioner was entitled to a jury trial of his § 1981 claims.[13] As this Court noted in Curtis v. Loether, 415 U.S. 189 (1974), the "Seventh Amendment . . . appl[ies] to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies enforceable in an action for damages in the ordinary courts of law." Id. at 194.[14] Applying that principle, every court of appeals to have addressed the issue has recognized that the Seventh Amendment

[13] The fact that the district court denied respondent's summary judgment motion on petitioner's Title VII claims because it saw "a genuine issue as to material facts" regarding what in fact happened, JA 23, strongly substantiates the conclusion that, had the court not applied erroneous legal principles to petitioner's § 1981 claims, petitioner would have been entitled to present the facts underlying those claims at trial.

[14] See also, Patterson v. McLean Credit Union, 105 L.Ed.2d 132, 156 (1989) (addressing jury instruction issue).

applies to § 1981 actions when the jury demand has been properly preserved.[15] That conclusion is further buttressed by this Court's holding that cases under the Reconstruction Civil Rights Acts resemble traditional tort actions (which lie within the core of the Seventh Amendment), and thus that the state statutes of limitations to "borrow" in § 1981 cases are those used in tort cases. See, e.g., Hardin v. Straub, 109 S.Ct. 1998, 2000 (1989); Owens v. Okure, 109 S.Ct. 573 (1989); Goodman v. Lukens Steel Co., 107 S.Ct. 2617 (1987); Wilson v. Garcia, 471 U.S. 261 (1985).

It is undisputed in this case that Lytle made a timely request for a jury trial pursuant to Fed. R. Civ. P. 38,

[15] See, e.g., Moore v. Sun Oil Co., 636 F.2d 154 (6th Cir. 1980); North v. Madison Area Ass'n for Retarded Citizens, 844 F.2d 401 (7th Cir. 1988); Setser v. Novack, 638 F.2d 1137, 1147 (8th Cir. 1981); Williams v. Owens-Illinois, Inc., 665 F.2d 918, 929 (9th Cir.), cert. denied, 459 U.S. 971 (1982) ; Skinner v. Total Petroleum, 859 F.2d 1439 (10th Cir. 1988); Lincoln v. Board of Regents, 697 F.2d 928, 935 (11th Cir. 1983).

and that he never waived that demand. In fact, he continued to object to the denial of his Seventh Amendment rights even after trial was underway. Thus, the district court erred by "substitut[ing] itself for the jury and, passing upon the effect of the evidence, find[ing] the facts involved in the issue and render[ing] judgment thereon." Baylis v. Travelers' Ins. Co., 113 U.S. 316, 321 (1885).

B. Petitioner Was Denied the Benefit of the Fundamental Values Protected by the Seventh Amendment Right to Trial by Jury

The Seventh Amendment provides in pertinent part that "[i]n suits at common law, where the value in controversy shall exceed $20, the right of the trial by jury shall be preserved . . . ." That entitlement holds a special, privileged position in American jurisprudence as a "basic and fundamental" right to be jealously guarded.

Jacob v. City of New York, 315 U.S. 752 (1942); Baylis v. Travelers' Ins. Co., supra; Hodges v. Easton, 106 U.S. (16 Otto) 408 (1882).

This Court has long recognized the critical function juries perform:

> [I]t is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts . . . . It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the more common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge.

Sioux City & Pacific R.R. Co. v. Stout, 84 U.S. (17 Wall.) 657, 664-64 (1874). It is precisely because the system of

adjudication benefits so strongly from "the infusion of the earthy common sense of a jury," United States v. One 1976 Mercedes Benz 208 S, 618 F.2d 453, 469 (7th Cir. 1980), that the Court and Congress[16] have repeatedly insisted, in both civil and criminal cases, that juries be drawn from the widest possible section of the community. See, e.g., Taylor v. Louisiana, 419 U.S. 522 (1975); Duncan v. Louisiana, 391 U.S. 145 (1968); Thiel v. Southern Pacific Co., 328 U.S. 217 (1945). As Chief Justice Rehnquist noted in his dissent in Parklane Hosiery Co. v. Shore, 439 U.S. 322, 344 (1979), "juries represent the layman's common sense, the 'passional elements in our nature,' and thus keep the administration of law in accord with the wishes and feelings of the

16 28 U.S.C. § 1861 et seq. (Jury System Improvements Act of 1978).

community. O. Holmes, Collected Legal Papers 237 (1920)."

The right to litigate claims under § 1981 before a jury can be especially important. When a plaintiff's claim rests on the assertion that a facially neutral action was undertaken for invidious racial purposes, the factfinder's assessment will often depend on "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 266 (1977). The factfinder will often be called upon to draw on his or her experience in the real world in assessing the plausibility of conflicting testimony,[17] and making inferential judgments.[18] The

17 Aetna Life Ins. Co. v. Ward, 140 U.S. 76, 88 (1891); Ellis v. Union Pac. R.R. Co., 329 U.S. 649, 653 (1947). See, also, Schnapper, Judges Against Juries -- Appellate Review of Federal Jury Verdicts, 1989 Wis.L.Rev. 237, 265-67.

18 Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29, 34-35 (1944) ("It is the jury, not the court, which . . . weighs the contradictory evidence and inferences . . . and draws the ultimate

perspectives of lay people, of different racial and ethnic backgrounds, both male and female, many of whom are likely to have had employment histories similar to a plaintiff, are bound often to result in juries reaching conclusions "that a judge either could not or would not reach." Parklane Hosiery Co. v. Shore, 439 U.S. at 344 (Rehnquist, J., dissenting). That a factual "dispute relates to an element of a prima facie case under McDonnell-Douglas . . . does not make it any less a matter for resolution by the jury." Estes v. Dick Smith Ford, Inc., 856 F.2d 1097, 1101 (8th Cir. 1988).

The instant case, involving straightforward claims but

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conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable."); Standard Oil Co. v. Brown 218 U.S. 78, 86 (1910) ("[W]hat the facts were . . . and what conclusions were to be drawn from them were for the jury and cannot be reviewed here."); Hyde v. Booraem & Co., 41 U.S. (16 Pet.) 232, 236 (1842) ("We have no authority, as an appellate court, upon a writ of error, to revise the evidence in the court below, in order to ascertain whether the judge rightly interpreted the evidence or drew right conclusions from it. That is the proper province of the jury . . . ."). Schnapper, n. 17, at 277-83.

conflicting evidence, is precisely the sort of litigation where a judge and jury might well have reached diametrically opposite conclusions.[19] A jury of laypersons, who resided in North Carolina and who worked in a similar setting, might well have concluded, for example, that Lytle was justified in believing that he did not have to call in on Saturday, because both Friday and Saturday were excused.[20] Had Miller testified, a jury might well have decided that his treatment of Lytle was not free from racial motives, based on credibility determinations, inferences from the evidence that racial discrimination had entered into Lytle's hiring (supra, p.7),

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19 Lytle's testimony of the events is all that was before the district, since the trial judge's Rule 41(b) dismissal truncated the proof. While it may be presumed that Miller would have disputed some of this testimony, he has never testified as to his version of the events of August 11, 1983.

20 The trial judge agreed that such a conclusion would be a "reasonable interpretation of the evidence." Tr. 252-53. Moreover, the district court found that at least one of the days in question was excused. See n. 6, supra.

or the fact that white employees were treated differently. Similarly, with regard to Lytle's claim of retaliation, a jury might well have concluded, not that the glowing letter of reference for Carpenter was inadvertent[21] but, that no such reference was given to Lytle because he had taken action to redress an alleged violation of his federally granted rights.

II. THE DENIAL OF SEVENTH AMENDMENT RIGHTS IS SUBJECT TO REVERSAL PER SE ON DIRECT APPEAL

A. This Court Has Always Treated Seventh Amendment Violations as Reversible Per Se

This Court has long recognized that "the claims of the citizen on the protection of this court [and, since the

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21 Joe Carpenter was fired for falsification of timesheets. Tr. 214-25. Carpenter, a white machinist who was the only Schwitzer employee other than Lytle fired in 1983, PX 19. Thus, although Lane Simpson, Schwitzer's manager of human resources testified on direct examination that he confused Carpenter with somebody else, a jury might have rejected this assertion based on that fact as well as on statements he made during cross examination. See, Tr. 271-274.

development of the courts of appeals, on those courts as well] are particularly strong" when a litigant has been denied his Seventh Amendment rights. Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 240 (1819). Thus, the Court has repeatedly and consistently redressed Seventh Amendment violations by directing that the issues improperly heard by a judge be retried before a jury. This Court has never excused the Seventh Amendment violation by holding that the judge's intervening factual findings pretermit presentation of a litigant's case to a jury. See, e.g., Pernell v. Southall Realty, 416 U.S. 263 (1974); Curtis v. Loether, 415 U.S. 189 (1974); Meeker v. Ambassador Oil Corp., 375 U.S. 160 (1963); Schoenthal v. Irving Trust Co., 287 U.S. 92 (1932); Scott v. Neely, 140 U.S. 358, 360 (1891); Buzard v. Houston, 119 U.S. 451, 454 (1886); Baylis v. Travelers' Insurance Co., 113 U.S. 316 (1885); Killian v.

Ebbinghaus, 110 U.S. 246, 248-249 (1884); Webster v. Reid, 52 U.S. 437 (1850); Lewis v. Cocks, 90 U.S. 70, 71 (1874); Hodges v. Easton, 106 U.S. 408 (1882).[22]

As recently as last Term, this Court once again applied this longstanding rule. In Granfinanciera S.A. v. Nordberg, 109 S.Ct. 2782 (1989), the bankruptcy court denied the petitioners' request for a trial by jury, conducted a bench trial, and entered findings and a judgment against the petitioners. Id. at 2787. The district court and court of appeals affirmed the

22 Other than the Fourth Circuit, all courts of appeals to have addressed this question have also treated Seventh Amendment violations as reversible per se. See, e.g., Marshak v. Tonetti, 813 F.2d 13 (1st Cir. 1987); Amoco Oil Co. v. Torcomian, 722 F.2d 1099 (3d Cir. 1983); EEOC v. Corry Jamestown Corp., 719 F.2d 1219 (3d Cir. 1983); Lewis v. Thigpen, 767 F.2d 252 (5th Cir. 1985); Matter of Merrill, 594 F.2d 1064 (5th Cir. 1979); Hildebrand v. Bd. of Trustees of Michigan State Univ., 607 F.2d 705 (6th Cir. 1979); United States v. One 1976 Mercedes Benz, 618 F.2d 453 (7th Cir. 1980); Bibbs v. Jim Lynch Cadillac, Inc., 653 F.2d 316 (8th Cir. 1981); Davis & Cox v. Summa Corp., 751 F.2d 1507 (9th Cir. 1985); Palmer v. United States, 652 F.2d 893 (9th Cir. 1981); United States v. State of New Mexico, 642 F.2d 397 (10th Cir. 1981); Hall v. Sharpe, 812 F.2d 644 (11th Cir. 1987); Sibley v. Fulton DeKalb Collection Service, 677 F.2d 830 (11th Cir. 1982).

bankruptcy judge's findings.

This Court concluded that the petitioners had been denied their rights under the Seventh Amendment. Id. at 2789-2800. Having reached that conclusion, the Court held that "the Seventh Amendment entitles petitioners to the jury trial they requested," id. at 2802, reversed the judgment of the court of appeals, and remanded for further proceedings, presumably including the jury trial petitioners had wrongly been denied. Notably, this Court accorded no weight whatsoever to the bankruptcy court's factual findings. Nor, of course, did it direct the court of appeals to review those improperly entered findings for correctness. In short, unlike the Fourth Circuit in Lytle's case, this Court in Granfinanciera did not hold that petitioner's Seventh Amendment claims were precluded by the decision in the bench trial.

This Court took the same approach in Tull v. United

States, 481 U.S. 412 (1987). In that case, the district court denied Tull's timely demand for a jury trial in a suit seeking civil penalties under the Clean Water Act, conducted a 15-day bench trial, entered findings against Tull, and imposed substantial fines. Id. at 415. This Court concluded that Tull had "a constitutional right to a jury trial to determine his liability on the legal claims," id. at 425, and remanded for him to be afforded a trial by jury, id. at 427. Again, in direct contrast to the approach used by the Fourth Circuit in Lytle's case, this Court in Tull afforded no weight whatsoever to the factual findings entered after the bench trial.[23]

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[23] Of particular salience, Tull also involved issues which were properly assigned to the judge rather than the jury. See 481 U.S. at 425-27 (size of civil fine). But this Court did not find that the judge's proper participation in the last stage of the proceeding immunized his erroneous appropriation of the jury's role, even though, in adjudicating the penalty, the judge necessarily revisited many of the factual issues involved in the finding of liability.

Similarly, the fact that the judge in this case was the appropriate factfinder on Lytle's Title VII claims should not immunize his unwarranted appropriation of the jury's role in

Of this Court's earlier cases, Meeker Oil v. Ambassador Oil Corp., 375 U.S. 160 (1963) (per curiam), represents a particularly decisive rejection of the Fourth Circuit's position. In Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959), a case which came before this Court on a petition for a writ of mandamus, the Court held that when the pleadings raise both legal and equitable issues, and a jury trial has been timely requested, the legal claims must be tried first before a jury, lest a premature non-jury decision on the equitable claims preclude a jury trial on those legal issues. Id. at 508-11. In Meeker, the trial judge, in violation of Beacon Theatres, decided the equitable claims first, and then relied on his own decision in favor of defendants to deny plaintiffs a jury trial, or any other relief, on their legal claims. The Tenth Circuit affirmed. 308 F.2d 875 (10th

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determining Lytle's § 1981 claims.

Cir. 1962). The petition for certiorari in Meeker challenged "[t]he error of the Court of Appeals in holding that the petitioners were in any way estopped or prohibited from contesting" their legal claims.[24] This Court granted certiorari, and after briefing and argument reversed the Tenth Circuit per curiam, citing Beacon Theatres and Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).

In all significant respects, the present case is Meeker. Here, too, the court of appeals has relied on the district court's findings on a plaintiff's equitable claims to justify not presenting legal claims raised in the same action to the jury. The fact that the district court here dismissed Lytle's legal claims before the bench trial, rather than simply holding them in abeyance pending the outcome of

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[24] Petition for Writ of Certiorari, October Term 1963, No. 46, p. 5.

the bench trial, does not alter the conclusion that the district court's errors denied the plaintiff his Seventh Amendment rights and must be reversed.

B. A Violation of the Seventh Amendment, Like Other Errors Which Result in the Wrong Entity Finding the Facts, Is Subject To Reversal Per Se

This Court has repeatedly held that when "the wrong entity" has conducted a trial over the objection of a litigant, reversal is the required appellate response "regardless of how overwhelmin[g] the evidence . . . ." Rose v. Clark, 478 U.S. 570, 578 (1986) (judge cannot direct verdict for conviction). This principle lies at the heart of the Court's decision last Term in Lauro Lines S.R.L. v. Chasser, 109 S.Ct. 1976 (1989). In Chasser, respondent sued petitioner in the Southern District of New York, over petitioner's objection that a forum-selection clause on respondent's ticket required all suits

to be brought in Naples, Italy. The Court held that the denial of petitioner's motion to dismiss on the basis of the forum-selection clause was not immediately appealable. It stated that "[p]etitioner's claim that it may be sued only in Naples, while not perfectly secured by appeal is adequately vindicable at that stage -- surely as effectively vindicable as a claim that the trial court lacked personal jurisdiction over the defendant . . . ." Id. at 1979. The clear import of the Court's analysis is that, if the forum-selection clause was violated, any verdict obtained in the Southern District will have to be set aside, regardless of whether the evidence would support it, because such a verdict will have been obtained from a factfinder not entitled to adjudicate the claims presented.

The perspective underlying Chasser is reflected in a wide array of cases in this Court which have rejected the assumption that the participation of an incorrect

factfinder is irrelevant if a proper factfinder could have reached the same result.[25] Cf., e.g., Gomez v. United States, 109 S.Ct. 2237 (1989) (when magistrate, rather than judge, presided over jury selection, reversal per se is required regardless of overwhelming evidence of guilt to support jury verdict); Liljeberg v. Health Services Acquisition Corp., 108 S.Ct. 2194, 2206 n. 16 (1988) (when judge should have recused himself under 28 U.S.C. § 455, new trial was required even though court of appeals held that his findings of fact had not been clearly erroneous); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825-28 (1986) (when judge should have disqualified

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[25] In any event, the clearly erroneous standard of Rule 52(a) applied by the court of appeals, see App. 10a-13a, simply cannot be appropriate to this kind of case. The Fourth Circuit did not decide that a jury could not or would not have found for Lytle. All its Rule 52(a) analysis determined was that a jury was not required as a matter of law to have done so, and thus that the judge's findings for the defendant were not wholly unsupportable. This Court has never held, in the case of a constitutional violation, that the appropriate standard of review is sufficiency of the evidence.

himself, reversal was required without regard to whether court would have decided the same way in the absence of the judge); Thiel v. Southern Pacific Co., 328 U.S. 217, 225 (1946) (verdict of jury selected from venire from which daily wage earners had improperly been excluded had to be set aside regardless of whether plaintiff was in any way prejudiced by its decision); Stevens v. Nichols, 130 U.S. 230 (1889) (where matter was improperly removed from state to federal court the latter's judgment after trial would be reversed for trial by state court); Flemming v. Nestor, 363 U.S. 603, 606-607 (1960) (where a statute mandates a three-judge court, judgment entered by a single judge must be reversed and remanded for

trial before a three-judge court, and consideration of the merits is precluded).

III. THE COURTS BELOW ERRED IN APPLYING PRINCIPLES OF COLLATERAL ESTOPPEL TO THIS CASE

The linchpin of the Fourth Circuit's analysis was its fundamentally flawed reading of this Court's opinion in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). Not only did the court of appeals misread Parklane Hosiery, but its interpretation would in fact fail to serve the interests in judicial economy embodied in the doctrine of collateral estoppel.[26]

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[26] The Fourth Circuit declined to apply the collateral estoppel rule, announced in Ritter v. Mount St. Mary's College, 814 F.2d 986 (4th Cir. 1987), cert. denied, 108 S. Ct. (1987), and followed by the panel in the instant case, in Swentek v. USAir, 830 F.2d 552, 559 (4th Cir. 1987). See also, Keller v. Prince George's County, 827 F.2d 952 (4th Cir. 1987) (applying the traditional rule that jury trial claims may be reviewed despite an intervening decision on the issues by a trial judge, but without referring to Ritter). But cf. Dwyer v. Smith, 867 F.2d 184, 192 (4th Cir. 1989) (noting inconsistency both within and without circuit, but holding that Ritter

A. Parklane Hosiery Does Not Apply to this Case

The question presented in Parklane Hosiery was "whether a party who has had issues of fact adjudicated adversely to it in an equitable action may be collaterally estopped from relitigating the same issues before a jury in a subsequent legal action brought against it by a new party." 439 U.S. at 324 (emphasis added). Parklane Hosiery Company was the defendant in two lawsuits: the first, an equitable action by the SEC; the second, a damages action by its stockholders. The question was whether the findings entered in the SEC's non-jury trial,[27]

preclusion rule is binding in the circuit).

[27] In concluding that collateral estoppel was permitted (not, contrary to the Fourth Circuit's rule in this case, that it was required, see 439 U.S. at 331), the Court expressly noted that "[t]he petitioners did not have a right to a jury trial in the equitable injunctive action brought by the SEC." 439 U.S. at 338 n. 24. Thus, Parklane Hosiery rests on the premise that the first proceeding was decided in a proper forum. Cf. Pennoyer v. Neff, 95 U.S. (5 Otto)

and affirmed on appeal, id. at 325, could bind Parklane Hosiery in the later damages action. The Court answered that question in the affirmative.

Parklane Hosiery clearly says nothing about whether the denial of the right to trial by jury is reviewable on direct appeal. Thus, Parklane Hosiery in no way undermines the force of the Meeker-Tull-Granfinanciera line of cases. Indeed, application of collateral estoppel presumes "litigation [which] proceeds through preliminary stages, generally matures at trial, and produces a judgment, to which, after appeal, the binding finality of res judicata and collateral estoppel will attach." Arizona v. California, 460 U.S. 605, 619 (1983) (emphasis added). As courts and commentators have recognized, there is a vast "difference between correction of procedural errors

714 (1877) (when a prior judgment was obtained in an improper forum, collateral estoppel is inappropriate).

on appeal in a single lawsuit and the refusal to inquire into possible errors when a prior judgment is offered to support preclusion." 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4418 (1989 Supp.) at 104 (footnote omitted); see Roebuck v. Drexel University, 852 F.2d 715, 738 (3d Cir. 1988); Volk v. Coler, 845 F.2d 1422, 1437 (7th Cir. 1988) (same); Wade v. Orange County Sheriff's Office, 844 F.2d 951, 954-55 (2d Cir. 1988); Hussein v. Oshkosh Motor Truck Co., 816 F.2d 348 (7th Cir. 1987) (same); Bouchet v. National Urban League, 730 F.2d 799 (D.C.Cir. 1984) (same). See also, Williams v. Cerberonics, Inc., 871 F.2d 452, 463 (4th Cir. 1989) (Phillips, J., dissenting).[28]

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[28] The appellant in Bouchet argued that the district judge had improperly dismissed her legal claims, and then resolved against her the similar issues raised by her equitable claims. Writing for the panel in that case, then-Judge Scalia explained that not only was the appellant entitled to a jury trial on her legal claims but the erroneous denial of her

> law claims and the consequent denial of her demand for jury trial would infect the disposition of her [equitable] claim as well, since most if not all of its elements would have been presented to the wrong trier of fact. Not only would a jury trial on her tort claims be required, but the [equitable] judgment -- even if otherwise valid -- would have to be vacated, and the whole case retried, giving preclusive effect to all findings of fact by the jury.

730 F.2d at 803-04.

The Fourth Circuit has expressly rejected then-Judge Scalia's reasoning: "The Bouchet proposition is . . . set forth without reference to Parklane, despite the clear relevance of that case to the issues presented. We find th[is] lower court opinio[n] unpersuasive . . . ." Ritter, 814 F.2d at 991.

Thus, as the Seventh Circuit noted in Hussein, a case whose procedural posture was identical to that of the present case:

> We believe that the present case presents a substantially different situation than that before the Supreme Court in Parklane. Here, there is no earlier valid judgment . . . .
>
> It is hardly "needless litigation" to reverse a judgment on the ground that the plaintiff was denied his right to a jury trial through no fault of his own solely because of the error of the trial court. It is inappropriate to apply collateral estoppel to preclude review of an issue on which the appellant could not have previously sought review . . . . The burden on judicial administration is no more than in other situations in which legal error is committed and

> a retrial is required . . . . We cannot sanction an application of collateral estoppel which would permit findings made by a court . . . to bar further litigation of a legal issue . . . when those findings were made only because the district court erroneously dismissed the plaintiff's legal claim. To permit such an application would allow the district court to accomplish by error what Beacon Theatres otherwise prohibits it from doing.

816 F.2d at 355-57.

Under the Fourth Circuit's approach, the narrow Katchen exception[29] would swallow up the broad Meeker Oil-Beacon Theatres-Dairy Queen rule. Faced with cases raising both legal and equitable claims, it would be the rare judge indeed who would not try the equitable claims first. Conducting the bench trial first would avoid the expenses and delays associated with jury trials. It would obviate the need for the kind of evidentiary rulings and

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[29] In Katchen v. Landy, 382 U.S. 323 (1966), the Court held that the Seventh Amendment is not violated by limiting trial to the court in a specialized bankruptcy scheme.

instructions that attend jury trials. And it would save the judge from facing the vast majority of post-trial motions for a judgment n.o.v. or for a new trial. Moreover, the preclusion afforded those bench rulings means that a trial court faces no costs in denying the right to a jury: even if the Seventh Amendment right was violated, the trial judge will not be required ever to conduct a jury trial. In short, the Fourth Circuit has created a powerful inducement for trial courts to violate the Seventh Amendment.

The holding in Parklane Hosiery was clearly not intended to create a perverse incentive for lower courts to violate the Seventh Amendment. Indeed, the Court's approving citation of Beacon Theatres' general prudential rule and the discussion of the limited situations under which that rule should not be followed, see 439 U.S. at 334-35 (discussing Katchen v. Landy, 382 U.S. 323

(1966)), show that Parklane Hosiery cannot be read to eliminate Seventh Amendment rights whenever bench trials have occurred.

B. The Fourth Circuit's Approach Would in Fact Undermine the Interest in Judicial Economy that the Doctrine of Collateral Estoppel Is Intended to Serve

The Seventh Amendment clearly is not a provision whose violation can be rendered harmless in the normal course of events by subsequent proceedings. Cf. Midland Asphalt Corp. v. United States, 109 S.Ct. 1494 (1989). Thus, the Fourth Circuit's rule cannot be read to bar all appellate review of Seventh Amendment claims. But if review of final judgments is barred, then appellate review must necessarily occur at some interlocutory phase of the litigation -- either (1) through mandamus proceedings prior to trial, see, e.g., Gulfstream Aerospace v.

Mayacamus Corp., 109 S.Ct. 1133, 1143 n. 13 (1988) (an "order that deprives a party of the right to trial by jury is reversible by mandamus"); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510-11 (1959) (same), or (2) through application of the collateral order doctrine of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949).[30]

In either event, the result is the same: appellate

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[30] Until now, the collateral order doctrine has been held inapplicable to denials of jury trials precisely because wrongful denials of jury trials could be corrected on appeal. See Morgantown v. Royal Insurance Co., 337 U.S. 264 (1949); Western Elec. Co. v. Milgro Electronic Corp, 573 F.2d 255, 256-57 (5th Cir. 1978) (specifically tying that conclusion to the nonapplicability of collateral estoppel when the Seventh Amendment had been violated).

But under the Fourth Circuit rule, denials of jury demands will fall under the collateral order doctrine, since they will satisfy all three prongs of the Cohen rule. See, e.g., Lauro Lines, 109 S.Ct. at 1978 (setting out the three conditions); Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (same). First, such orders will "conclusively determine the disputed question," id., namely, whether the litigant has the right to trial before a jury. Second, they will "resolve an important issue completely separate from the merits of the action," id., since who the factfinder should be is in no sense equivalent to what the facts are. Finally, the very nature of the Fourth Circuit rule is to hold such orders entirely "unreviewable on appeal from final judgment." Id.

courts will continue to face claims of Seventh Amendment violations. The primary effect of the Fourth Circuit's rule will be to require interlocutory appellate review, and to prompt appeals in all cases in which a jury demand has been denied (and not only in cases where the party demanding the jury subsequently loses at the bench trial),[31] since parties whose demands have been denied will no longer be able to appeal that denial as part of an appeal from a generally adverse final judgment. Thus, the Fourth Circuit's rule will have the ironic consequence of increasing the burden on courts of appeals.

In short, the Fourth Circuit's rule does not even serve the goals it purports to further. In light of the tremendous costs it imposes on a fundamental constitutional right, it is entirely unjustified.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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[31] The availability of collateral review or mandamus does not, however, mean that an aggrieved party who elects not to utilize those avenues of review, but instead awaits conclusion of the district court proceedings, loses the right of review. 9 Wright & Miller, Federal Practice and Procedure: Civil § 2322 at p. 105 (1971). The failure to take an immediate appeal of the denial of a Seventh Amendment right has never been construed as a waiver of that constitutional right. Rule 38, Fed. R. Civ. P., specifies what constitutes waiver of the right: failure to make a timely demand. And such waiver is not to be implied lightly. See, e.g., Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393 (1937) ("the right of jury trial is fundamental [and] courts [must] indulge every reasonable presumption against waiver"); Hall v. Sharpe, 812 F.2d 644, 649 (11th Cir. 1987); Gargiulo v. Delsole, 769 F.2d 77, 79 (2d Cir. 1985) ("plaintiffs were not required to walk out of the courtroom rather than proceed with the bench trial in order to preserve [their right of appeal]").

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